SERUAN GEMILANG MAKMUR SDN BHD v. BADAN PERHUBUNGAN UMNO NEGERI PAHANG DARUL MAKMUR

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
LIM YEE LAN JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: C-02-1740-08-2013]
10 JULY 2015

CIVIL PROCEDURE: *Damages – Assessment of damages – High Court reversing finding of Deputy Registrar – Whether Deputy Registrar dealt with demeanour and competency of witnesses – Whether assessment procedure and reasoning of Deputy Registrar passed acid test of reasonableness – Whether assessment ought to be disturbed*

The plaintiff had brought an action against Kerajaan Negeri Pahang and Pengarah Perhutanan Negeri Pahang and obtained judgment for the sum of RM37,127,471.60 ('Suit 28') and subsequently sued the defendant herein for RM31,160,295. The defendant, however, filed its defence and counter claim seeking damages against the plaintiff. The defendant then filed an application to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 and succeeded, leaving only the defendant's counter claim to be tried. The defendant subsequently made an application *vide* encl. 151, *inter alia*, for the payment of RM37,127,471.60. The High Court however ruled that the plaintiff was liable and ordered assessment of damages, *ie*, prayer 2 of the counter claim. Upon appeal, the Court of Appeal affirmed the order of assessment of damages. The Deputy Registrar, in assessment of damages, ruled that the defendant had not proven the damages according to law and hence, the defendant appealed to the High Court. The High Court Judge, in reversing the finding of the Deputy Registrar, ordered judgment for the sum of RM37,127,471.60 and assessed damages in the sum of RM1,019,512. Hence, the appeal against the assessment of damages.

Held (allowing appeal; setting aside order of High Court)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) It was clear that the order to enter judgment for RM37,127,471.60 was erroneous on the face of record as it was not consistent with the orders made in respect of encl. 151 and the decision of the Court of Appeal. Consequently, the judgment for RM37,127,471.60 was bad in law and ought to be set aside at *limine*. (para 12)

(2) The High Court in hearing an appeal from a decision of the Deputy Registrar relating to assessment of damages must be slow to disturb the finding of facts and assessment of damages more so when the Deputy Registrar had heard the witness and observed the demeanour. The Deputy Registrar had dealt with the issue of demeanour as well as competency of one of the witnesses and the lack of *bona fide* in another

witness. The assessment procedure and the reasoning of the Deputy Registrar passed the acid test of reasonableness and it ought not to have been disturbed by the High Court Judge. (para 13)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif telah memulakan tindakan terhadap Kerajaaan Negeri Pahang dan Pengarah Perhutanan Negeri Pahang dan telah memperoleh penghakiman bagi sejumlah RM37,127,471.60 ('Guaman 28') dan kemudiannya menyaman defendan di sini sebanyak RM31,160,295. Walau bagaimanapun, defendan memfailkan pembelaan dan tuntutan balas menuntut ganti rugi terhadap plaintif. Defendan kemudian telah memfailkan permohonan untuk membatalkan tuntutan plaintif di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan telah berjaya, meninggalkan hanya tuntutan balas defendan untuk dibicarakan. Selepas itu, defendan membuat permohonan melalui lampiran 151, antara lain, bagi pembayaran sebanyak RM37,127,471.60. Mahkamah Tinggi walau bagaimanapun telah memutuskan bahawa plaintif bertanggungan dan mengarahkan taksiran ganti rugi, iaitu permohonan kedua dalam tuntutan balas. Atas rayuan, Mahkamah Rayuan mengesahkan perintah pentaksiran ganti rugi. Timbalan Pendaftar, dalam mentaksir ganti rugi, memutuskan bahawa defendan tidak membuktikan ganti rugi mengikut undang-undang dan oleh itu, defendan merayu kepada Mahkamah Tinggi. Hakim Mahkamah Tinggi, dalam mengakas keputusan Timbalan Pendaftar, mengarahkan penghakiman bagi jumlah RM37,127,471.60 dan mentaksir ganti rugi sejumlah RM1,019,512. Oleh itu, rayuan terhadap pentaksiran ganti rugi.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Adalah jelas bahawa perintah untuk memasukkan penghakiman bagi RM37,127,471.60 berdasarkan rekod jelas salah kerana ia tidak konsisten dengan perintah-perintah berkenaan dengan lampiran 151 dan keputusan Mahkamah Rayuan. Oleh yang demikian, penghakiman bagi RM37,127,471.60 adalah cacat dari segi undang-undang dan wajar diketepikan secara *limine*.

(2) Mahkamah Tinggi dalam mendengar rayuan daripada keputusan Timbalan Pendaftar yang melibatkan pentaksiran ganti rugi tidak boleh tergesa-gesa mengganggu dapatan fakta dan pentaksiran ganti rugi tersebut lebih-lebih lagi apabila Timbalan Pendaftar telah mendengar keterangan dan melihat perilaku saksi. Timbalan Pendaftar telah mempertimbangkan isu perilaku dan kompetensi salah seorang daripada saksi dan kekurangan *bone fide* dalam saksi yang satu lagi. Prosedur pentaksiran dan penaakulan Timbalan Pendaftar telah melepasi ujian kemunasabahan dan tidak wajar diganggu oleh Hakim Mahkamah Tinggi.

Case(s) referred to:

Damusa Sdn Bhd v. MRCB Prasarana Sdn Bhd [2013] 1 LNS 1489 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA ***(refd)***

Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd [2003] 1 CLJ 12 CA ***(refd)***

Tanjung Tiara Sdn Bhd v. Paragro Sdn Bhd [2010] 9 CLJ 400 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

For the appellant - Gopal Sri Ram (Mohd Aznel Azaharudin, CK Lim & David Yii Hee Kiat with him); M/s Aznel & Assocs

For the respondent - Bastian Vendargon (Toh Seng Soon, Wong Fook Yong, Ong Siew Wan & Toh Hwei Sze with him); M/s Toh & Company

[Editor's note: For the High Court judgment, please see Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur (Melalui Setiausahanya Dato' Ahmad Tajudin Sulaiman) [2004] 1 LNS 55]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/plaintiff appeals against the decision of the High Court which set aside the order of Deputy Registrar in an assessment of damages proceeding. The appeal came up for hearing on 13 April 2015 and upon hearing we allowed the appeal and reinstated the order of learned Deputy Registrar dated 24 September 2012 which states:

(i) Bahawa Defendan telah gagal untuk membuktikan sebarang kerugian;

(ii) Bahawa taksiran ganti rugi Defendan ditolak;

(iii) Bahawa kos dibayar oleh Defendan; dan

(iv) Bahawa Notis Untuk Mengemukakan (Kandungan 208) ditolak dengan kos.

My learned brother Balia Yusof bin Haji Wahi JCA and learned sister Lim Yee Lan JCA have read the judgment and approved the same. This is our judgment.

Brief Facts

[2] The instant case and issue of damages has a chequered history. We do not wish to set out the entire facts as it has been adequately canvassed by the parties and also set out in the 20-page judgment of the learned trial judge. Much judicial time will be saved if the issues raised to encl. 151 and encl. 245 which relate to assessment of damages are dealt with in the judgment.

[3] The plaintiff had brought an action against Kerajaan Negeri Pahang and Pengarah Perhutanan Negeri Pahang *vide* in High Court Suit No. 21-9-2002 and obtained judgment for the sum of RM37,127,471.60 out of the sum of RM32,723,906.60 claimed (Suit No. 22-28-2003). Subsequently, the plaintiff sued the defendant in this action for RM31,160,295. The defendant filed defence and counterclaim. In the counterclaim, the defendant sought damages against the plaintiff and also attempted to claim the sum of RM37,127,471.60 which was the judgment sum obtained by the plaintiff in the High Court Suit No. 21-9-2002 stated above.

[4] In Suit No. 22-28-2003, the defendant then filed an application to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 and succeeded leaving only the defendant's counterclaim to be tried. Without fixing the matter for trial, the defendant then made an application *vide* encl. 151 to dispose of its counterclaim. The defendant's counterclaim reads as follows:

And the defendant counterclaims:

1.1. An order that the agreement dated 2.10.2000 is null and void.

1.2. In the alternative, an Order that the Agreement dated 2.10.2000 be rescinded.

1.3. An order that all benefits and/or profits to which the Plaintiff has obtained and/or will obtain either on its own and/or from any other parties based on and/or relying on and/or relating to the Agreement be forthwith paid to the Defendant.

1.4. Interest at the rate of 8% per annum on all the benefits and/or profits in the event that the Plaintiff fails to pay to the Defendant according to item 1.3 above.

2. Damages to be assessed.

3. Interest on Damages at the rate of 8% per annum from the date of the Writ until full settlement.

4. Costs.

5. Such further order and/or other relief that this Honourable Court deems fit and proper.

[5] The defendant's encl. 151 reads as follows:

BENARKAN SEMUA PIHAK yang berkenaan hadir di hadapan Hakim/Penolong Kanan Pendaftar Dalam Kamar pada haribulan 18 Jan 2011 pukul pagi/petang untuk mendengar permohonan oleh pihak Defendan yang bernama di atas untuk perintah seperti berikut:

1. Bahawa Defendan diberi kebenaran untuk memohon supaya soalan-soalan atau isu-isu fakta dan/atau undang-undang seperti yang dinyatakan selepas daripada ini yang berbangkit melalui pliding atau selainnya dikeputuskan oleh Mahkamah Yang Mulia ini menurut Aturan 33(2) Kaedah-Kaedah Mahkamah Tinggi, 1980;

2. Bahawa soalan-soalan atau isu-isu fakta dan/atau undang-undang yang berbangkit melalui pliding atau selainnya dalam tindakan ini dikeputuskan oleh Mahkamah Yang Mulia seperti berikut:

   (a) Bahawa Defendan hanya memberi kebenaran kepada Plaintif untuk mengerjakan pengeluaran saki baki kayu balak dan kayu pole bagi 9,000 ekar sahaja daripada tanah seluas 10,000 ekar yang diluluskan kepada Defendan oleh pihak berkuasa negeri;

   (b) Bahawa Plaintif tidak memperolehi kebenaran daripada Defendan untuk mengerjakan pengeluaran saki baki kayu balak dan kayu pole dari blok yang lebih dikenali sebagai Blok A2;

   (c) Bahawa Perjanjian bertarikh 02/10/2000 adalah terbatal dan tidak sah dan/atau telah diberhentikan maka dengan demikian Plaintif adalah tidak berhak kepada sebarang faedah, manfaat dan/atau keuntungan yang diperolehi oleh Plaintif dengan bergantung dan/atau menggunakan Perjanjian bertarikh 02/10/2000 tersebut termasuk apa-apa tindakan guaman dan sebagainya;

   (d) Bahawa Defendan adalah berhak kepada segala faedah, manfaat dan/atau keuntungan yang diperolehi oleh Plaintif dengan bergantung dan/atau menggunakan Perjanjian bertarikh 02/10/2000 tersebut;

Maka seterusnya, perintah-perintah lanjut seperti berikut diberikan:

3. Bahawa Plaintif bayar kepada Defendan dengan serta merta amaun penghakiman tersebut berjumlah sebanyak RM37,127,471.60 dengan faedah keatasnya pada kadar 8% setahun mulai 31.12.2000 hingga penjelasan;

4. Bahawa faedah, manfaat dan/atau keuntungan yang diperolehi oleh Plaintif melalui kerja-kerja pengeluaran saki baki kayu balak dan kayu pole dari blok yang lebih dikenali sebagai Blok A2 ditaksirkan dan dibayar dengan serta merta kepada Defendan dengan faedah ke atasnya pada kadar 8% setahun mulai tarikh writ saman sehingga penjelasan;

5. Kos permohonan ini dibayar oleh Plaintif kepada Defendan; dan

6. Lain-lain perintah dan/atau relif yang dianggap perlu dan sesuai oleh Mahkamah Yang Mulia ini bagi maksud dan tujuan permohonan ini.

[6] It is important to note that notwithstanding the defendant in encl. 151 had *inter alia* asked for the payment of RM37,127,471.60, the High Court ruled that the plaintiff is liable and ordered assessment of damages, ie, prayer 2 of the counterclaim only. That is to say the court in hearing encl. 151 did not award the sum of RM37,127,471.60 but held that the defendant is entitled for damages to be assessed. (See A/R p. 961).

[7] The High Court Order dated 16 June 2011 in respect of encl. 151 is at pp. 961 and 962, and the relevant part of the order read as follows:

> MAKA ADALAH PADA HARI INI DIPERINTAHKAN bahawa Perjanjian bertarikh 12/10/2000 adalah terbatal dan tidak sah dan/atau telah diberhentikan;
>
> DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa berkenaan dengan Tuntutan Balas Defendan terhadap Plaintif maka hanya tinggal isu ganti rugi sahaja untuk taksiran;
>
> DAN ADALAH AKHIRNYA DIPERINTAHKAN bahawa kos permohonan ini dijadikan kos dalam kausa.

[8] On the defendant's appeal to the Court of Appeal, the High Court Order on assessment of damages was affirmed, and the appeal was dismissed.

[9] The broad grounds of the Court of Appeal (A/R 725) in respect of encl. 151 read as follows:

> Unanimous decision of this Court.
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> We thank counsel for their submissions.
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> We dismiss the appeal for the following brief reasons:
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> (1) Although the learned High Court Judge had found that the agreement dated 2.10.2000 was void and unenforceable, the learned High Court Judge went on to make an Order that the Respondent's counterclaim be allowed and for damages to be assessed.
>
> (2) The Respondent's counterclaim is not dependent on the agreement dated 2.10.2000 which was held to be void. The Respondent's counterclaim was based on the fact that the Appellant had harvested timber in an area known as Block A2 for which the respondent had never given its consent. The grant of such relief to the Respondent was covered by question at paragraph 2(d) of the Summons-in-Chambers dated 23rd December 2010. Therefore the contention of the Appellant that damages cannot be awarded in respect of a void contract cannot be upheld in this case.
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> (3) We accordingly dismiss the appeal with costs.
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> Costs is fixed at RM30,000 payable to the Respondent. Deposit to be refunded.

[10] It is crucial to note that the plaintiff did not file any cross-appeal in respect of encl. 151, and in respect of other prayers which the High Court did not grant, in particular the sum of RM37,127,471.60.

[11] Upon the decision of the Court of Appeal, the matter went before the Deputy Registrar for assessment of damages. The Deputy Registrar ruled that the defendant had not proved the damages according to law. The order of Deputy Registrar dated 24 September 2012 (AR – pp. 772 and 773) in particular reads as follows:

MAKA ADALAH PADA HARI INI DIPERINTAHKAN bahawa Defendan telah gagal untuk membuktikan jumlah kerugian yang dialami atau manfaat yang telah diperolehi oleh Plaintif hasil dari perjanjian tersebut dan seterusnya tuntutan Defendan untuk taksiran ganti rugi ini ditolak dengan kos.

[12] Against the order of the Deputy Registrar, the defendant appealed to the judge in chambers *vide* encl. 245, the subject matter of the instant appeal. The learned trial judge reversed the finding of the Deputy Registrar and ordered judgment for the sum of RM37,127,471.60 and reviewed the evidence before the learned Deputy Registrar and assessed damages in the sum of RM1,019,512. The relevant parts of the order dated 4 July 2013 read as follows:

DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa selaras dengan Perintah Mahkamah bertarikh 16.06.2011 melalui Saman Dalam Kamar bertarikh 23.12.2010 (Lampiran 151) Responden/ Plaintiff bayar kepada Perayu/Defendan amaun penghakiman dalam Mahkamah Tinggi Malaya di Kuantan Guaman No. MT 21-9- Tahun 2002 berjumlah sebanyak RM37, 127,471.60 dengan faedah ke atasnya pada kadar 8% setahun mulai 31.12.2000 sehingga penyelesaian.

DAN ADALAH JUGA DIPERINTAHKAN bahawa Responden/ Plaintif bayar kepada Perayu/Defendan ganti rugi yang ditaksirkan bagi kerja-kerja pengeluaran saki baki kayu balak dan kayu pole dari blok yang lebih dikenali sebagai Blok A2 berjumlah sebanyak RM1,019,512.00 dengan faedah ke atasnya pada kadar 5% setahun mulai 27.03.2003 sehingga penyelesaian.

(i) From the factual matrix and history of this case, it is clear that the order to enter judgment for RM37,127,471.60 is erroneous on the face of record as it was not consistent with the orders made in respect of encl. 151 and the decision of the Court of Appeal which we have dealt with earlier. In consequence the judgment for RM37,127,471.60 is bad in law and ought to be set aside at *limine*.

Decision Of The Court

[13] We have read the appeal records and the able submissions of learned counsel. After giving much consideration to the submissions of learned counsel for the plaintiff, we are of the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) The only issue left is the order relating to assessment of damages. In this regard, it is well settled that the High Court in hearing an appeal from a decision of Deputy Registrar relating to assessment of damages must be slow to disturb the finding of facts and assessment of damages more so when the Deputy Registrar had heard the witness and observed the demeanour. Support for the proposition is found in a number of cases,

A to name a few are as follows: (i) *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12 (CA); (ii) *Tanjung Tiara Sdn Bhd v. Paragro Sdn Bhd* [2010] 9 CLJ 400; (iii) *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 (FC); (iv) *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813; [2013] 2 MLJ 650.

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(b) We have gone through the notes of evidence and the grounds of the learned Deputy Registrar at pp. 767-771 of the appeal records where she had dealt with the issue of demeanour as well as competency of one of the witnesses and the lack of *bona fide* in another witness. On the facts

C of the case, we take the view that the assessment procedure and the reasoning of the learned Deputy Registrar passed the acid test of reasonableness and it ought not to have been disturbed by the learned High Court Judge. (See *Damusa Sdn Bhd v. MRCB Prasarana Sdn Bhd* [2013] 1 LNS 1489 (Civil Appeal No: J-02(NCVC)(W)-963-05-2012 (23 January 2013)).

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[14] For the reasons stated above, the appeal is allowed and the order of the High Court dated 4 July 2013 is set aside. The order of the Deputy Registrar dated 24 September 2012 is reinstated. The defendant to pay the plaintiff's agreed costs of RM10,000 and deposit to be refunded.

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We hereby ordered so.

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